

NO. 22770

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN WEBER,

Appellant,

vs.

RALPH AOKI, TRUSTEE,

Appellee.

FEB 24 1969

APPELLEE'S ANSWERING BRIEF

FILED

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APPELLEE'S ANSWERING BRIEF

JURISDICTION

Appellant has filed a Notice of Appeal on January 18, 1968 (R. 79) to two orders denying rehearings on November 21, 1967 (R. 71) and on December 27, 1967 (R. 78) and moved for an extension of time on February 27, 1968 extending the time for filing of the records on appeal and the docketing of the appeal to March 18, 1968 (R. 81). No further extensions were sought or granted by or to the Appellant and the appeal was docketed on April 17, 1968.

This Court does not have jurisdiction over this appeal because the orders of November 21, 1967 and December 27, 1967 respectively which denied the Petitions for Rehearing are not appealable.

Fowler vs Smisser, (C.C.A. 10 1960) 274
F.2d 335, cert. den, 362 U.S. 938, 80 S.Ct.
1076, 4 L.Ed. 2d 1022.

In re Wright, (D.C. Mo. 1965) 247 F. Supp.
648.

In re American Textile Printers Co., (D.C.
N.J. 1957) 152 F. Supp. 901.

This Court has no jurisdiction over the appeal since the docketing of the appeal was not completed in accordance with Rule 73(g) of the Federal Rules of Civil Procedure. The docketing of the appeal was made on April 17, 1968 which was thirty days after the expiration of the time for the docketing of the appeal.

Rule 73(g) Federal Rules of Civil Procedure,
U.S. vs Gallagher (C.C.A. 9 1945) 151 F.2d
556.

STATEMENT OF THE CASE

The Appellee does not accept the Appellant's Statement of the Case as stated and sets forth the following facts which are pertinent to this appeal.

The Order of the Referee in Bankruptcy approving the Trustee's Petition for Compromise was filed with the United States District Court of Hawaii on April 20, 1967 (R. 42).

The Findings of Fact and Conclusions of Law (R. 52) was filed by the Referee in Bankruptcy on July 12, 1967, nunc pro tunc as of April 20, 1967. After having heard the evidence at hearings held on April 6 and 18, 1967 and considering the same, he sets forth the following findings:

"1. The Trustee, Ralph S. Aoki, is the duly appointed

and qualified, acting Trustee of the above named Bankrupt on November 1, 1966.

2. That the Petition for Intervention in Civil No. 19448, First Judicial Circuit Court, State of Hawaii, Weber Trucking and Equipment Rental, Inc. vs. J. P. Finan General Contractor, Inc., Defendant and Communication Satellite Corporation and First National Bank of Hawaii, Garnishees, was filed on January 16, 1967 in which the substitution of the Trustee in place of the Bankrupt as Plaintiff was approved by John E. Parks, counsel for Weber Trucking and Equipment Rental, Inc.

3. That on January 16, 1967 an Order Granting Leave for the Trustee Ralph S. Aoki to intervene and be substituted in place of the Bankrupt in aforesaid Civil No. 19448 was approved by William B. Cobb the Referee in Bankruptcy.

4. That on March 21, 1967 the Petition for Leave to Compromise Claim was filed in the United States District Court for the District of Hawaii in which the Trustee requested the compromise of the above described action which was filed on June 24, 1966 for the total sum of \$56,201.61 by Weber Trucking and Equipment Rental, Inc. and the Answer and Counterclaim of \$61,084.61 was filed on July 15, 1966 by the Defendant J. P. Finan General Contractor, Inc.

5. That in said Petition for Leave to Compromise Claim there was attached thereto a letter addressed to the Trustee Ralph S. Aoki dated March 20, 1967, the offer by J. P.

Finan General Contractor, Inc. without prejudice the sum of \$5,000.00 as a compromise settlement of Civil No. 19448.

6. That Petition for Disallowance of Claim Against J. P. Finan General Contractor, Inc. was filed on April 4, 1967 by the President and sole stockholder of Bankrupt.

7. That there was no creditor who appeared at the hearings on April 6 and 18, 1967 to object to the granting of the Trustee's Petition for the Compromise of the Claim of the Bankrupt against J. P. Finan General Contractor, Inc. for the total sum of \$5,000.00 notwithstanding the fact that the notice of the hearing was given to all creditors dated March 24, 1967 and scheduled for the first hearing on April 6, 1967.

8. The Trustee Ralph S. Aoki testified that he had reviewed the action which was filed by the Bankrupt against the Defendant J. P. Finan General Contractor, Inc. and a series of meetings were held with both J. P. Finan General Contractor, Inc. and Roy Weber, General Manager, of Weber Trucking and Equipment Rental, Inc. and that based on the meetings and review of the files he has recommended the approval of the compromise of the claim.

9. The Trustee testified that the extras and additional work claimed by Bankrupt were not claimed and approved as required by the terms of the contracts and the complex litigation that was involved and expense that would be necessary to litigate this matter and the uncertainty of the result and the cost of litigation as well as the existence of the unsettled questions of

liability were factors in arriving at the request for the compromise.

10. J. P. Finan, President of J. P. Finan General Contractor, Inc. testified as to his company's defense to the suit in the State Court by the Bankrupt and in support of the back charges and other monies advanced by him on the Bankrupt's behalf during the work called for by the contracts; that J. P. Finan's testimony was supported by V. Rex Clay and Robert C. Kerley, CPA's, accountants for J. P. Finan General Contractor, Inc. who testified that books and records of the company supported the counterclaim of the Company against the Bankrupt.

11. That the matter of the detailed examination of all of the books and records of the general contractor together with the examination of the contracts, extras, additional work and back charges would result in a trial of the case with the attendant expense of such litigation in which the success of the Trustee is in doubt."

The Referee further set forth the following Conclusions of Law:

"1. That the Trustee Ralph S. Aoki is authorized under the provisions of 11 U. S. C. A. Sec. 52 to enter into the compromise of any controversy with the approval of the Court.

2. That the Trustee Ralph S. Aoki with the approval of the Referee in Bankruptcy was permitted to intervene and be substituted for the Bankrupt as party plaintiff with the consent

of the Bankrupt through its attorney in Civil No. 19448 which action was filed in the First Judicial Circuit Court of the State of Hawaii on June 24, 1966 by the bankrupt as party plaintiff.

3. That the Petition for Disallowance was not filed by a creditor but was filed by the President and sole stockholder of the Bankrupt through its attorney John E. Parks.

4. That the Trustee in determining the advisability of the compromise has the right to take into account the uncertainty and cost of litigation as well as the existence of the unsettled questions of liability in view of the claim and counterclaim which was filed in Civil No. 19448.

5. That the litigation in the above entitled case would result in the Trustee and his attorney spending considerable time in the proof of claims the liability of the entire claims not being clearly established and the respective back charges and other counterclaim being made by J. P. Finan General Contractor, Inc.

6. That by virtue of his substitution as party plaintiff in Civil No. 19448 (Hawaii State Court) in place of the Bankrupt and with the consent of the Bankrupt, the Trustee is thereby empowered to decide whether such case is to be litigated or settled subject only to the approval of this Court.

7. That based on the evidence and the hearings that it would be advisable and prudent to accept the compromise proposal offered by J. P. Finan General Contractor, Inc. and the

Trustee and that the compromise proposal be approved and the Trustee authorized to enter into a stipulation for the dismissal of the action and counterclaim.

8. That the Petition for Approval of the Compromise in Civil No. 19448 of the First Judicial Circuit Court, State of Hawaii, for \$5,000.00 be approved and that the Order Allowing the Compromise be entered in which the Trustee will be authorized to enter into the Stipulation for Dismissal."

The Petition for Review from the Order of the Referee in Bankruptcy was filed by Appellant as the President and the sole stockholder of Weber Trucking and Equipment Rental, Inc. (R. 45).

On September 18, 1967 the Honorable Martin Pence entered an Order denying the Petition for Review filed by the Appellant. (R. 60). In said Order Judge Pence made the following finding:

"The Court finds that the counsel for the Petitioner Helen Weber was given every opportunity at the two hearings before the Referee to go into all of the details of the proposed compromise; that the Referee was satisfied that the compromise should be approved; that the Petitioner Helen Weber had the burden to show that the action of the Referee was clearly erroneous; that Petitioner has shown nothing and stated nothing to the Court to show that the action of the Referee was clearly erroneous; that the evidence before this Court and that which was before the Referee compels this Court to find that the Referee's Conclusions based on his Findings of Fact were not completely erroneous all as more fully set out in the oral decision in the record herein."

Judge Pence further ordered as follows:

"1. That the Order of the Referee in Approving the Trustee's Petition for Compromise on April 20, 1967 be and it hereby is affirmed.

"2. That the Petition for Review filed herein be and the same is hereby denied.

"3. That the Motion for Dismissal of the Referee's Findings of Fact and Conclusions of Law filed herein on July 13, 1967 nunc pro tunc as of April 20, 1967 be and the same is hereby denied."

The Appellant did not file a Notice of Appeal from the Order of the District Court. Instead of filing the Notice of Appeal, the Appellant on September 26, 1967 filed her first Petition for Rehearing (R. 64) and on November 21, 1967 the Honorable C. Nils Tavares entered an Order denying the first Petition for Rehearing (R. 71). The Order was made after the Court considered the Petition for Rehearing and the record and the argument of the counsel for Appellant and Appellee.

On November 29, 1967 the Appellant filed a Second Motion for Rehearing (R. 73) and on December 27, 1967 the Honorable Martin Pence denied the Second Motion for Rehearing and entered a ruling on the Motion for Rehearing (R. 78).

The Appellant then filed a Notice of Appeal on January 18, 1968 from the Order Denying the First Petition for Rehearing filed on November 21, 1967 and from the ruling on the Second Motion for Rehearing filed on December 27, 1967 (R. 79).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear this appeal when the appeal was from the two orders denying petitions for rehearing by the Appellant?
2. Whether this Court has jurisdiction when the Appellant has failed to docket her appeal in compliance with Rule 73(g) of the Federal Rules of Civil Procedure?
3. Whether an appeal lies from an Order, Findings of Fact and Conclusions of Law of the Referee in Bankruptcy affirmed by the United States District Court when there has been no showing of clear error and abuse of discretion?
4. Whether the Appellant is a "person aggrieved" under the Bankruptcy Act?

ARGUMENT

I. THIS COURT HAS NO JURISDICTION OVER THE APPELLANT'S APPEAL FILED HEREIN.

As the records show, the Notice of Appeal was filed on behalf of the Appellant on January 18, 1968 (R. 79) from the two orders denying the rehearing request of the orders entered by the United States District Court of Hawaii affirming the Referee's ruling on September 18, 1967 (R. 60). The appeal period of sixty days from the Order of September 18, 1967 expired on November 18, 1967.

The United States Supreme Court in order to resolve a conflict between circuits granted certiorari in Wayne United

Gas Company vs Owens-Illinois Glass Company (1937), 300 U.S. 131, 57 S.Ct. 382, 81 L.Ed. 556 to declare that a district court could in its discretion rehear a cause even after the expiration of the period allowed by the bankruptcy act for appeal from the order disposing of the matter in controversy. The Supreme Court said in the Wayne United Gas Company case on Page 137:

"The defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing takes the risk that he may lose his right of appeal, as the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal."

The ruling of the Wayne United Gas Company case has been followed by subsequent decisions in the Federal Courts. Fowler vs Smisser, (C.C.A. 10 1960) 274 F.2d 335, cert. den. 362 U.S. 988, 80 S.Ct. 1076, 4 L.Ed. 2d 1022, In re Wright, (D.C. Mo. 1965) 247 F. Supp. 648, In re American Textile Printers Co., (D.C. N.J. 1957) 152 F. Supp. 901.

The appeal time may not be extended by the device of appealing from the ruling on the petition for a rehearing. Mintz vs Lester (C.C.A. 10 1938) 95 F.2d 590.

The Appellant in this case had extended the docketing period which expired on March 18, 1968 and finally docketed her appeal thirty days later on April 17, 1968 without any extension filed. Under Rule 73(g) of the Federal Rules of Civil Procedure it is provided as follows:



"The record on appeal as provided for in Rule 75 and 76 shall be filed with the Appellate Court and the appeal there docketed within forty days from the date of filing the Notice of Appeal; except that, when more than one appeal is taken from the same judgment to the same Appellate Court, the district court may prescribe the time for filing and docketing, which in no event shall be less than forty days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than ninety days from the date of filing the first notice of appeal."

In United States vs Gallagher (C.C.A. 9 1945) 151

F.2d 556 the Notice of Appeal was filed on March 21, 1945 and on April 30, 1945 before the expiration of the forty day period within which the record on appeal must be filed under Rule 73(g) of the Federal Rules of Civil Procedure, the District Court made an order extending the time for filing the record to May 21, 1945 and the record was not filed on May 21, 1945. On May 31, 1945 ten days subsequent to May 21, 1945 the Circuit Court of Appeals by an Order extended the time for the filing of the record on to June 16, 1945. The Court held that the extension of the time for docketing of the record on appeal was held to be invalid.

This Court has no jurisdiction over the appeal since the Appellant docketed her appeal thirty days after the expiration of the time for the docketing of the appeal.



II. THE ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE REFEREE IN BANKRUPTCY AND THE ORDERS OF THE UNITED STATES DISTRICT COURT SHOW NO CLEAR ERROR AND ABUSE OF DISCRETION.

The decision of the Referee in Bankruptcy as to the approval or disapproval of a compromise agreement rests upon sound discretion which is reviewable by the district judge but will normally not be set aside except where there is a plain error or abuse of discretion and after affirmance of the Referee's approval by the district court, the order will not be reversed unless discretion has been abused. Florida Trailer & Equipment Co. vs Deal, (C.C.A. 5 1960) 284 F.2d 567.

The Federal District Court and the Court of Appeals are required to accept the Findings of the Referee in Bankruptcy unless such Findings are clearly erroneous. Farmer Brothers Company vs Huddle Enterprises, Inc. (C.C.A. 9 1966) 366 F.2d. 143. See also Washington vs Houston Lumber Company (C.C.A. 10 1962) 310 F.2d. 881; Hoppe vs Rittenhouse, (C.C.A. 9 1960) 279 F.2d. 3; In re Knollhoff, (D.C. Kan. 1965) 239 Fed. Supp. 927.

III. APPELLANT IS NOT A "PERSON AGGRIEVED" UNDER THE BANKRUPTCY ACT.

A person who was a general creditor and former officer and shareholder of bankrupt corporation was not a "person aggrieved" under 11 U.S.C. Sec. 67 and entitled to seek review of the referee in bankruptcy's order. In re Sunningdale Country Club, (C.C.A. 6 1965) 351 F.2d 139.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Appellant's appeal be dismissed.

Dated: Honolulu, Hawaii, this 10th day of January, 1969.

Respectfully submitted,

Hirosaki Sakai
HIROSHI SAKAI
Attorney for RALPH AOKI,
Appellee

CERTIFICATE

I certify that, in connection with the preparation of this Appellee's Answering Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellee's Answering Brief is in full compliance with those rules.

Hirosaki Sakai

HIROSHI SAKAI

I also certify that I have delivered three copies of the within Appellee's Answering Brief to the office of Leslie T. Bennett, Attorney for J. P. Finan General Contractor, Inc., and three copies of the Appellee's Answering Brief to John E. Parks, Attorney for Helen Weber, Appellant.

Hirosaki Sakai

HIROSHI SAKAI

